

1 DANIEL G. BOGDEN
United States Attorney
2 LISA C. CARTIER GIROUX
Assistant United States Attorney
3 501 Las Vegas Boulevard South
Suite 1100
4 Las Vegas, Nevada 89101
PHONE: (702) 388-6336
5 FAX: (702) 388-6418

6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
8 **-oO-**

9 UNITED STATES OF AMERICA,
10 Plaintiff,
11 vs.
12 RAMON DESAGE,
13 Defendant.

2:13-CR-00039-JAD-VCF

GOVERNMENT'S RESPONSE TO
DEFENDANT DESAGE'S MOTION AND
MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR DISCOVERY (Doc. #150)

14 COMES NOW the United States of America, by and through DANIEL G. BOGDEN, United
15 States Attorney, and Lisa C. Cartier Giroux, Assistant United States Attorney, and responds in
16 opposition to the motion filed on January 30, 2016, by defendant RAMON DESAGE, seeking an
17 order from the Court that the government provide him with: (1) a Bill of Particulars; (2) Disclosure
18 of the identities of all unindicted co-conspirators; (3) Production of all relevant documents, reports,
19 and materials pursuant to Fed.R.Crim.P. 16; (4) Production of any and all audio and/or video
20 surveillance tapes or any other form of surveillance performed by the Government, or any agent of
21 the Government, pertaining in any manner whatsoever to Defendant Desage; (5) Disclosure of any
22 reference to Defendant Desage in any audio and/or video surveillance tapes or any other form of
23 surveillance performed by the Government, or any other agent of the Government; (6) Immediate
24 disclosure of all *Brady* material; (7) Immediate disclosure of all *Giglio* and Jencks Act material; (8)

1 Grand Jury testimony made in seeking the return of the indictment; (9) An itemized list of all
 2 exhibits intended to be used by the Government in its case-in-chief; (10) A list of all witnesses that
 3 the Government intends to call in presenting its case-in-chief; and (11) Any and all FRE 404(b)
 4 material the Government intends to present and/or utilize in this case. Docket 150, 2 at 1-16. For
 5 the reasons set forth herein, the defendant's motion should be denied.

6 ARGUMENT

7 Defense counsel wrote a letter dated November 19, 2014 to the then assigned Assistant
 8 United States Attorneys, Gregory Damm and Crane Pomerantz, with a very similar discovery
 9 request as to what he made in Docket #150. Mr. Damm wrote a letter in response answering each of
 10 the requests made by defense counsel. Prior to answering the letter and in response to a request for a
 11 Bill of Particulars, in January of 2015, Mr. Damm also sent to defense a spreadsheet of the wire
 12 fraud and money laundering counts and the evidence (including Bates numbers) that the government
 13 may present to support the charges.¹ The government has met its duties under *Brady v. Maryland*,
 14 373 U.S. 83 (1963)), as well as its discovery obligation under Federal.R.Crim.P 16. The government
 15 will continue to meet its ongoing obligation to turn over exculpatory evidence and impeachment
 16 material that impugns the testimony of a witness critical to the prosecution's case. *Milke v. Ryan*,
 17 711 F.3d 998, 102-03 (9th Cir. 2013) (*citing United States v. Bagley*, 473 U.S. 667, 674-75 (1985));
 18 *Giglio v. United States*, 405 U.S. 150, 153-55 (1972); *Brady*, 373 U.S. 83 at 87; *United States v.*
 19 *Sedaghaty*, 728 F.3d 885, 902 (9th Cir. 2013).

20 1. A Bill of Particulars

21 Rule 7(f) of the Federal Rules of Criminal Procedure states:

22 The court may direct the government to file a bill of particulars. The
 23 defendant may move for a bill of particulars before or within 14 days
 after arraignment or at a later time if the court permits. The

24 ¹ Although Mr. Damm provided answers to the defendant's demands and the spreadsheet, the government has never indicated that its evidence at trial will be limited to what was contained in those documents.

1 government may amend a bill of particulars subject to such
2 conditions as justice requires.

3 The Grand Jury returned a true bill on the Superseding Indictment on February 11, 2014. Doc. #59.

4 The defendant's request for a bill of particulars was clearly filed more than fourteen days after
5 arraignment, and it is untimely filed. *See* Doc. #150.

6 The trial court has discretion to grant or refuse a request for a bill of particulars. *Yeargain v.*
7 *United States*, 314 F.2d 881, 882 (9th Cir. 1963); *Wong Tai v. United States*, 273 U.S. 77, 82 (1927).

8 A bill of particulars has three functions: “[1] to inform the defendant of the nature of the charge
9 against him with sufficient precision to enable him to prepare for trial, [2] to avoid or minimize the
10 danger of surprise at the time of trial, and [3] to enable him to plead his acquittal or conviction in bar
11 of another prosecution for the same offense when the indictment is itself too vague, and indefinite
12 for such purposes.” *United States v. Giese*, 597 F.2d 1170, 1180 (9th Cir. 1979); *see also United*

13 *States v. Ayers*, 924 F.2d 1468, 1483 (9th Cir. 1991). The purpose of a bill of particulars is met “if
14 the indictment itself provides sufficient details of the charges and if the Government provides full
15 discovery to the defense.” *United States v. Mitchell*, 744 F.2d 701, 705 (9th Cir. 1984). The

16 defendant is entitled under the constitution to know the offenses with which he is charged, not the
17 details of how the prosecution intends to prove the charge. *United States v. Kendall*, 665 F.2d 126,
18 135 (9th Cir. 1981). The superseding indictment in this case lists the elements of the charges against
19 the defendant and the statutes he is accused of violating, as required by Fed. R. Crim. P. 7. It also
20 details the years of the alleged fraudulent tax forms, the approximate amounts of unreported taxable
21 income and tax loss, and specifies the wire transmissions at issue for each count charged. The
22 information provided in the superseding indictment is more than sufficient to inform the defendant
23 of the charges against him and to allow him to adequately prepare a defense. The government has
24 complied with its obligations under Fed.R.Crim.P. 16 and provided full discovery and will continue

1 to do so. The defendant additionally has the spreadsheet of the wire fraud and money laundering
2 counts and the evidence (including Bates numbers) that the government may present to support the
3 charges which was voluntarily provided by the former AUSA, Mr. Damm, in response to the
4 defendant's prior request for a bill or particulars. The request for a bill of particulars should be
5 denied because it is a simply a request for the government to further specify how it will use the
6 evidence to prove defendant's guilt and to identify and reveal its trial strategy, which is not the
7 purpose of a bill of particulars. *Giese*, 597 F.2d at 1181.

8 **2. Disclosure of the identities of all alleged unindicted co-conspirators**

9 The defendant seeks a list of the identities of any unindicted co-conspirators in this case.
10 Defendant in this matter has been provided with extensive discovery as to the means, method, and
11 known participants in the conspiracy. Unlike a criminal enterprise case, for example, where the
12 involvement of five or more persons is an element of the offense, the identities of unindicted co-
13 conspirators in this case, if any there be, is not an element of the conspiracy charged in the instant
14 case. *See* 21 U.S.C. Section 848(c). In *United States v. Rey*, 923 F.2d 1217, 1222 (6th Cir.1991), a
15 case where the defendant claimed his counsel's ability to prepare for trial was impeded because he
16 did not have the names of the co-conspirator before trial, the court held that such a list was not
17 required because “[a] defendant may be indicted and convicted despite the names of his co-
18 conspirators remaining unknown...” *Id.*; *See also Rogers v. United States*, 340 U.S. 367, 375 (1951).
19 Defendant is asking the Court to order the government to go through the discovery simply to identify
20 unindicted individuals who the government believes may or may not be a part of the alleged
21 conspiracy. The superseding indictment adequately advises the defendant of the nature of the charge,
22 and the discovery provides the defendant with the evidence which the government believes supports
23 the charges. The government therefore requests that the Court deny defendant's request.

24 ...

1 **3. Production of all relevant documents, reports, and materials pursuant to Fed.R.Crim.P. 16**

2 The government has met its obligations under Fed.R.Crim.P. 16 and will continue to act with
3 due diligence to provide defendants with any item that falls under the rule as it comes into its
4 possession.

5 **4. Production of any and all audio and/or video surveillance tapes or any other form of**
6 **surveillance performed by the Government, or any agent of the Government, pertaining in any**
manner whatsoever to Defendant Desage

7 The government has met its obligations under Fed.R.Crim.P. 16 and will continue to act with
8 due diligence to provide defendants with any item that falls under the rule as it comes into its
9 possession.

10 **5. Disclosure of any reference to Defendant Desage in any audio and/or video**
11 **surveillance tapes or any other form of surveillance performed by the Government, or any**
other agent of the Government

12 The government has met its obligations under Fed.R.Crim.P. 16 and will continue to act with
13 due diligence to provide defendants with any item that falls under the rule as it comes into its
14 possession. The government is not required to go through the discovery for the defendant and give
15 him notice of where in the discovery such information, if any there be, is found. The Court should
16 deny this request.

17 **6. Immediate disclosure of all Brady material**

18 The government has met its duties under *Brady* and will continue to meet its ongoing
19 obligations.

20 **7. Immediate disclosure of all Giglio and Jencks Act material**

21 The Jencks Act and Fed.R.Crim.P. 26.2 and 16(a)(2) do not provide for pretrial discovery of
22 statements made by prospective witnesses. *See* Fed.R.Crim.P. 16(a)(2) (“Nor does this rule authorize
23 *the discovery or inspection of statements made by prospective government witnesses except as*
24 *provided in 18 U.S.C. § 3500 [the Jencks Act]”). The government has, however, previously provided*

1 *Giglio* and Jencks Act material in discovery. The government will comply with its obligation to
2 produce all *Giglio* and Jencks Act material in its possession ten days before trial except to the extent
3 earlier disclosure is required by Fed.R.Crim.P. 16 or *Brady*.

4 **8. Grand Jury testimony made in seeking the return of the indictment**

5 Defendant has moved to require production of grand jury testimony. Grand Jury secrecy is
6 governed by Rule 6(e). Grand jury testimony of a witness whom the government intends to call at
7 trial to testify with regard to the same subject matter, are statements within the reading of the Jencks
8 Act and not within the purview of Rule 16. *See United States v. Walk*, 533 F.2d 417 (9th Cir.1975);
9 *United States v. Cardenas-Mendoza*, 579 F.3d 1024 (2009); *United States v. Callahan*, 534 F.2d 763
10 (7th Cir. 1976), *cert. denied*, 429 U.S. 830 (1976); *United States v. Kenny*, 462 F.2d 1205, 1212 (3d
11 Cir.), *cert. denied*, 409 U.S. 914 (1972); *United States v. Wilkerson*, 456 F.2d 57 (6th Cir.), *cert.*
12 *denied*, 408 U.S. 926 (1972). The government will produce Jencks Act material in its possession ten
13 days before trial except to the extent earlier disclosure is required by Fed.R.Crim.P. 16 or *Brady*.

14 **9. An itemized list of all exhibits intended to be used by the Government in its case-in-
15 chief**

16 Rule 16(a)(1) does not require the government to identify specifically which evidence it
17 intends to use at trial. It merely requires that the Government produce evidence falling into the
18 enumerated categories. While this case is document-intensive, that circumstance is not unusual and
19 is consistent with the nature of the alleged fraud. Furthermore, as explained above, the superseding
20 indictment sets forth sufficiently the charges against defendants by describing the fraudulent claims
21 and the documentation underlying each count. The government will comply with the Court's
22 standard trial order requiring counsel at Calendar Call in a criminal case to supply the Court's
23 Courtroom Deputy Clerk with the original and two copies of a complete exhibit list of all exhibits
24 that are intended to be used during the trial, and serve a copy upon all other parties.

1 **10. A list of all witnesses that the Government intends to call in presenting its case-in-**
 2 **chief**

3 A defendant in a noncapital case does not have a right to discover a list of prospective
 4 government witnesses. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (due process does not
 5 require government to provide names of witnesses unfavorable to defendant); *see also* 18 U.S.C.A. §
 6 3432. The government is not required to identify the witnesses it intends to call at trial in this case.
 7 *United States v. Sukumolachan*, 610 F.2d 685, 688 (9th Cir. 1980); *see also United States v. Steele*,
 8 785 F.2d 743, 750 (9th Cir. 1986). Despite attempts to amend Rule 16 to compel the government
 9 and the defense to disclose names of prospective witnesses before trial, Congress has consistently
 10 rejected such efforts. H.R. Conf. Rep. No. 414, 94th Cong. 1st Sess. 12 (1975) (“majority of
 11 Conferees believe that it is not in the interest of the effective administration of criminal justice to
 12 require that the Government or defendant to be forced to reveal the names and addresses of its
 13 witnesses before trial.”). Relative to discovery in civil matters, criminal discovery is more narrowly
 14 limited. “Rule 16 … makes no provision for the production of the names and addresses of witnesses
 15 for the government.” *United States v. Fischel*, 686 F.2d 1082, 1091 (5th Cir. 1982); *see also United*
 16 *States v. Edwards*, 47 F.3d 841, 843 (7th Cir. 1995) (“the Constitution does not require pretrial
 17 disclosure of prosecution witnesses … nor does [Rule] 16”).

18 It is within the discretion of a court to order such disclosure to ensure the effective
 19 administration of the criminal justice system. The government will comply with the Court’s standard
 20 trial order requiring counsel at Calendar Call to file with the Court’s Courtroom Deputy Clerk a list
 21 of witnesses expected to be called on behalf of each party for use by the Court during jury selection.

22 **11. Any and all Federal Rule of Evidence 404(b) material the Government intends to**
 23 **present and/or utilize in this case**

24 The government is aware of its duty to provide reasonable notice of its intent to offer FRE

1 404(b) evidence during the trial and will abide by the requirements of the rule to provide such
2 notice.

3 **IV. CONCLUSION**

4 For the above stated reasons, the Government respectfully requests this Court deny the
5 Defendant's *Motion for Discovery*. (Doc. #150).

6 Respectfully submitted this 14th day of August, 2016.

7 Respectfully submitted,

8 DANIEL G. BOGDEN
9 United States Attorney

10 //s//

11 LISA C. CARTIER GIROUX
12 Assistant United States Attorney

13 **CERTIFICATION**

14 I, LISA C. CARTIER GIROUX, certify that the foregoing document was served on counsel by means
15 of electronic filing.

16 DATED: August 14, 2016

17 //s//

18 LISA C. CARTIER GIROUX
19 Assistant United States Attorney

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